## APPENDIX A.

Filed November 27, 1962

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

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| In the Matter of<br>Dandy Products, Inc., a corporation and Joseph M. Gron, individually and as an officer of said corporation, and Joseph M. Gron and Carlo E. Farrari, copartners trading and doing business as Capitol Mailers. | Docket No. 8467. |

INITIAL DECISION.

William K. Jackson, Hearing Examiner.

Roy B. Pope, Counsel Supporting the Complaint.

Charles H. Rowan and Willis W. Hagen,
Milwaukee, Wisconsin,
Counsel for Respondents.

This proceeding was commenced by the issuance of a complaint on February 9, 1962, charging the respondents with unfair acts and practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act, through the use of lottery schemes or games of chance in the sale and distribution of their merchandise.

This proceeding is now before the hearing examiner for final consideration upon the complaint, answer thereto,

testimony and other evidence, proposed findings of fact and conclusions of law filed by both parties and briefs. The hearing examiner has given consideration to the proposed findings of fact and conclusions submitted by the parties and briefs in support thereof, and all findings of fact and conclusions proposed by the parties, respectively, not hereinafter specifically found or concluded are herewith rejected, and the hearing examiner having considered the record herein and being duly advised in the premises makes the following findings as to the facts, conclusions drawn therefrom, and order.

## FINDINGS OF FACT.

1. Respondent, Dandy Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 9 South Clinton Street, Chicago, Illinois. Respondent, Joseph M. Gron, is president of the corporate respondent and has his office and place of business at the same address as the corporate respondent. Said individual respondent formulates, directs and controls the acts and practices of the said corporate respondent.

2. Individual respondents, Joseph M. Gron and Carlo E. Ferrari, are copartners trading and doing business as Capitol Mailers with their office and principal place of business at 555 West Adams Street, Chicago, Illinois. The business address of the respondent, Joseph M. Gron, is as hereinbefore set forth and the business address of the respondent, Carlo E. Ferrari, is the same as that of the partnership. The individual respondents formulate, direct and control the acts and practices of the partnership.

3. Respondents, Dandy Products, Inc., and Joseph M. Gron, are now and for some time last past, have been

engaged in the offering for sale, sale and distribution of transistor radios, watches, cameras, ball point pens, toy animals, dolls, small electrical appliances including lamps, cutlery and other articles of merchandise to the public and have caused their said merchandise when sold to be transported from their place of business in Chicago, Illinois, to purchasers thereof located in the various states of the United States, and now maintain, and for some time last past have maintained, a substantial course of trade in such merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. The respondents, Joseph M. Gron and Carlo E. Ferrari, copartners trading and doing business as Capitol Mailers, are now, and for some time last past, have been engaged in providing mailing services to firms in various lines of business requiring assistance in getting out large mailings. Among their customers for whom they provide such mailing services are Sears Roebuck and Company, Standard Oil Company, Swift & Company, Allstate Insurance Company, Lee Ward Company, Dun & Bradstreet, Charles World Encyclopedia and over 100 other firms. Dandy Products, Inc. is only one of their clients and the percentage of Capitol Mailers' total business done for Dandy Products, Inc. is approximately 16 per cent. Specifically, the services performed by Capitol Mailers for Dandy Products, Inc. are as follows: the push cards, circulars, order blanks and return envelopes, together with the envelopes in which they are to be mailed and the mailing lists of the prospective customers are delivered to Capitol Mailers, in bulk, and packaged in large cartons; one of each of the various pieces above described is placed in the envelope to be sent to the proposed customer; a sticker containing the name and address of the proposed customer is affixed and the envelope sealed, and the envelopes are then tied, sacked and delivered to the post office for mailing

to various states of the United States. Respondents, Joseph M. Gron and Carlo E. Ferrari, copartners trading as Capitol Mailers, in performing such mailing services, act under the direction and control of Dandy Products, Inc. In performing such services, Joseph M. Gron and Carlo E. Ferrari, copartners trading as Capitol Mailers, sell no merchandise in interstate commerce and are merely paid for their services on the basis of $5.90 per 1,000 items mailed. Joseph M. Gron and Carlo E. Ferrari, copartners trading as Capitol Mailers, do not process, handle, prepare for mailing or mail, respondent's, Dandy Products, Inc., merchandise.

5. Respondents, Dandy Products, Inc. and Joseph M. Gron, in the course and conduct of their business, in offering for sale, selling and distributing their merchandise, furnish and have furnished, various plans of merchandising which involve the operation of games of chance, gift enterprises or lottery schemes when said merchandise is offered for sale, sold and distributed to the purchasing public. Among the methods and sales plans adopted and used by the aforesaid respondents, and which is typical, but not all inclusive, of the practices of the respondents, is the following:

Respondents, Dandy Products, Inc. and Joseph M. Gron, distribute and have distributed, to operators and to members of the public, through the use of the mailing services of Capitol Mailers described above, certain literature and instructions including, among other things, push cards, order blanks and circulars which have thereon illustrations and descriptions of said merchandise. Said circulars also explain respondents' plan of selling and distributing their merchandise and of allotting it as premiums or prizes to the operators of said push cards, and as prizes to members of the purchasing public who purchased chances or pushes on said cards. One of Dandy Products, Inc.'s push cards,

which is typical of all push cards distributed by them, bears forty names with ruled lines on the back of said card for writing in the name of the purchaser of the push corresponding to the name selected. Said push card has forty partially perforated discs. Each of said discs bears one of the names corresponding to those on the lines of the reverse side. Concealed within each disc is the number which is disclosed only when the disc is pushed or separated from the card. The push card also has a larger master seal and concealed within the said master seal is one of the names appearing on the discs. The person selecting the name corresponding with the one under the master seal receives a fountain and candlestick ensemble. The push card bears the following legend or instructions:

"(Picture of Table Showing
Centerpiece and Two Candlesticks)

Lucky Name Under Seal Gets This
Spray-A-Lite Fountain & Candlestick Ensemble

- Translucent marbelized plastic
- Sends up a sparkling fountain of water from petaled water lily
- Measures a full 16" in diameter
- Packet of realistic ferns included
- Automatically recirculates water
- 110 V AC Current
- Complete with cord and plug

Complete With Matching Candlestick Holders

Pure enchantment wherever you place it . . . on your dining table, buffet or artfully displayed on your sunporch or patio. The entire ensemble is spectacular as a centerpiece or you can use the fountain and candlesticks separately.

Nos. 4 and 17 receive a beautiful retractable ball point pen.

No. 1 pays 1c, No. 4 pays 4c, No. 9 pays 9c, No. 17 pays 17c. All others pay 49c. None Higher.

Do Not
Remove Seal
Until Entire
Card is
Sold

Push Out
with Pencil

(Appearing on Reverse Side.)

| | |
|---|---|
| ADA | MIN |
| AL | NAN |
| AMY | PAT |
| ANG | PEG |
| ANN | RAY |
| ART | ROY |
| BAB | SAM |
| BEA | SID |
| BEN | SIS |
| BES | SYB |
| DOC | SUE |
| DON | TED |
| FAE | TES |
| GIN | TIM |
| JAN | VAL |
| LEA | VEE |
| LOU | VIC |
| MAE | VIV |
| MEG | WES |
| MIL | WIN |

This card contains 40 names. No. 1 pays 1c; No. 4 pays 4c; No. 9 pays 9c; No. 17 pays 17c; all others pay 49c; None Higher. This card is given to you absolutely free. If you wish you can use this as a sales card. It can be used with any merchandise. Prospective purchaser is not obliged to pay unless he desires to do so. If You Desire To Purchase Merchandise From Us You Can Do So At Any Time.

Total $17.95

Postmaster: This parcel may be opened for postal inspection if necessary."

6. Sales of the merchandise of Dandy Products, Inc. and the respondent, Joseph M. Gron, by means of said push cards are made in accordance with the above described instructions, and the prizes or premiums are allotted to the customers or purchasers from said cards in accordance with the above legend or instruction. Whether a purchaser receives an article of merchandise or nothing for the amount of money paid, and the amount to be paid for the merchandise, or the chance to receive said merchandise, are thus determined wholly by lot or chance. The articles of merchandise have a value substantially greater than the price paid for each chance or push. The aforesaid respondents furnish, and have furnished, various push cards accompanied by order blanks, instructions and other printed matter for use in the sale and distribution of their merchandise by means of games of chance, gift enterprises or lottery schemes. The sales plans or methods involved in the sale of all of the said merchandise by means of said other push cards are the same as that herein above described varying only in detail as to the merchandise distributed and the number and prices of chances on each card.

7. Sales of merchandise of Dandy Products, Inc. pursuant to the aforesaid plan are consummated by mailing the order forms to Dandy Products, Inc. and by direct shipment of the merchandise from Dandy Products, Inc. to the customer. Dandy Products, Inc. also employs another firm, Package Mailers, to ship their merchandise to their customers.

8. The persons, to whom Dandy Products, Inc. and respondent, Joseph M. Gron, furnish and have furnished said push cards, use the same in selling and distributing said respondents' merchandise in accordance with the aforesaid sales plan. The aforesaid respondents thus supply to and place in the hands of others the means of conducting games of chance, gift enterprises or lottery schemes

in the sale of their merchandise in accordance with the sales plan hereinabove set forth. The use by respondents of said sales plans or methods in the sale of their merchandise and the sale of said merchandise by and through the use thereof and by the aid of said sales plans or methods is a practice which is contrary to an established public policy of the Government of the United States.

## Conclusions.

1. The law is well settled by an unbroken line of decisions too numerous to mention that the practice of selling merchandise by means of a gaming device or lottery, which includes push cards or punch boards, is a practice which is contrary to public policy of the United States, and that where such practice occurs in commerce it is an unfair trade practice and a violation of the Federal Trade Commission Act. *F. T. C.* v. *R. F. Keppel & Co., Inc.*, 291 U. S. 304 (1934); *Wren Sales Company, Inc.* v. *F. T. C.*, 296 F. 2d 456 (C. A. 7, 1961). The main thrust of respondents' argument is directed to the fact that many states in recent years have legalized pari-mutual betting, bingo, raffles, etc. and in such states these acts are no longer criminal offenses. In addition, respondents note that in recently proposed federal criminal legislation, and under existing federal criminal enactments, Congress did not include punch boards or push cards among the various types of gambling paraphernalia excluded as illegal from the mails or interstate commerce. Respondents therefore reason that since these various types of gambling or gambling devices are no longer illegal in many states, and have not been so designated under federal criminal laws, their use in merchandising is no longer against "public policy". Such is not the law. In *Maltz* v. *Sax*, 134 F. 2d 2 (C. A. 7, 1943), the court in considering this very argument said:

> "Moreover, in the absence of any statute condemning gambling as illegal, the Federal Courts have consistently condemned it as against public policy. *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227."

In addition, it is clear that a device which is calculated to appeal to the public's gambling instincts, may be considered an unfair act or practice, within the meaning of the Federal Trade Commission Act, when used in interstate commerce to sell or distribute merchandise, even though the device itself may not technically be a lottery or gambling device within the meaning of some penal or other statute. *Modernistic Candies, Inc.* v. *F. T. C.*, 145 F. 2d 454, 455 (C. A. 7, 1944) and *Lichtenstein* v. *F. T. C.*, 194 F. 2d 607, 611 (C. A. 9, 1952). It was stated in *Modernistic Candies, Inc.*:

> "We think the Commission . . . has the power to prohibit the distribution in interstate commerce of devices intended to aid and encourage merchandise by gambling. . . ."

The Supreme Court has also recognized the distinction between criminal statutes outlawing lotteries and lottery devices and the Federal Trade Commission Act prohibiting *merchandising* by means of lotteries or lottery devices. In the *Keppel* Case, *supra*, the Court said:

> "A method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt, *even though it is not criminal*, was thought to involve the kind of unfairness at which the statute was aimed." [Emphasis supplied.]

Respondents also argue that prospective customers are given the opportunity of buying the merchandise outright at the stated prices without the necessity of using the

push cards or punch boards supplied by respondents. It is immaterial that some persons may purchase the merchandise without using the push cards or punch boards, since the push card or punch board devices are clearly designed to serve as an instrumentality for the sale of articles of merchandise by lottery methods. Its use for that purpose being prohibited under the Federal Trade Commission Act, it is of no consequence that some customers may conceivably elect not to use the lottery device. See *Globe Cardboard Novelty Co.* v. *F. T. C.*, 192 F. 2d 444, 448 (C. A. 3, 1951) and *Seymour Sales Co.* v. *F. T. C.*, 216 F. 2d 633, 636 (C. A. D. C., 1954).

2. The complaint herein charged, among other things, that, "All of the aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter refererd to."[1] The record contains no evidence to support this charge and complaint counsel apparently has abandoned this charge, since no reference to it is included in his proposed findings or conclusions. Although abandoning the charge of conspiracy, between the respondent corporation, Dandy Products, Inc., on the one hand, and Joseph M. Gron and Carlo E. Ferrari, copartners trading and doing business as Capitol Mailers, on the other hand, complaint counsel seeks a cease and desist order against the individual partners[2] on the theory that Capitol Mailers is an integral part of the scheme to sell merchandise by means of a lottery and performs an essential function by mailing the push cards.[3] In support of this position, complaint counsel relies

1. Complaint, Paragraph One, Second Paragraph on Page 2.

2. Inasmuch as Joseph M. Gron, as president of Dandy Products, Inc., was named a party respondent in his individual capacity and the order as hereinafter adopted so includes him, the actual effect of an order against the individual partners would be to include Carlo E. Ferrari.

3. No facts were adduced and no findings were proposed implicating or otherwise associating respondent, Carlo E. Ferrari, with the unfair acts and practices of Dandy Products, Inc., except as to the mailing services herein found.

on several cases which hold that aiding and abetting this method of merchandising make the participants *particeps criminis* so that all are engaged in unfair trade practices contrary to public policy.

The cases relied upon are as follows: *Modernistic Candies, Inc.* v. *F. T. C.*, 145 F. 2d 454, 455; *Maltz* v. *Sax*, 134 F. 2d 2; *Hamilton Manufacturing Co.* v. *F. T. C.*, 194 F. 2d 346; *U. S. Printing and Novelty Company* v. *F. T. C.*, 204 F. 2d 737, and *Wren Sales Company, Inc.* v. *F. T. C.*, 296 F. 2d 456. The first four cases cited above all concerned manufacturers of punch boards or variations thereof which were sold to others who utilized the punch boards in the sale or distribution of merchandise. Upholding a cease and desist order against the manufacturer of the board in *Maltz* v. *Sax*, *supra*, the court said:

> "Therefore, though his making and sale of punch boards may not be gambling, his status is fixed by his inseparable connection with the gambling business, and he will be left where he placed himself. . . ."

Capitol Mailers do not manufacture punch boards and their activities cannot be equated to any such close and inseparable connection with the gambling business. As heretofore found, Capitol Mailers performs a mailing service to over a hundred clients including Dandy Products, Inc. It acts under the direction and control of these clients in performing a routine task for which it is paid a set fee per item mailed. It does not process, handle, prepare for mailing or mail respondent's, Dandy Products, Inc., merchandise. Under these circumstances, and in the absence of any precedents extending the doctrine of the cases cited to persons engaged in providing mere routine services, a cease and desist order against Joseph M. Gron and Carlo E. Ferrari, copartners trading and doing business as Capitol Mailers, is not warranted and the hearing examiner so concludes.

The *Wren* case, referred to above, has no application to Capitol Mailers' activities, since the respondents in that case were engaged in the sale of their merchandise by means of punch boards in the same fashion as respondent herein, Dandy Products, Inc.

It would also be pointed out that as proposed by complaint counsel and as hereinafter adopted by the hearing examiner, the cease and desist order issued in this proceeding includes both respondent Dandy Products, Inc. and Joseph M. Gron, individually and as an officer of said corporation. Since the order will apply to Joseph M. Gron individually, it will apply to his activities as a partner in Capitol Mailers as well as an officer of Dandy Products, Inc. or in any other capacity and insures that the practices found to be against the public interest will be effectively stopped by the order to cease and desist.

In the Matter of *Bristol-Myers Co., et al.*, 46 F.T.C. 162, 176 (1949), the Commission had before it a somewhat comparable situation and stated:

> "The Commission is of the opinion, however, and in the exercise of its sound discretion concludes, that the complaint in this proceeding should be dismissed as to the respondents Pedlar & Ryan, Inc., and Young & Rubicam, Inc. This is for the reason that, although these respondents participated in the dissemination of the advertising found to be false or misleading, they at all times acted under the direction and control of respondent Bristol-Myers Co., their employer, with whom rested the final authority and responsibility for such advertising, and for the further reason that the practices found to be against the public interest will be stopped by the order to cease and desist issued against Bristol-Myers Co."

3. The sale of merchandise to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure one of the said articles of

merchandise at a price much less than the normal retail price thereof. Many persons are attracted by said sales plans or methods used by respondents, Dandy Products, Inc. and Joseph M. Gron, and the element of chance involved therein and thereby are induced to buy and sell said respondents' merchandise.

4. The use by respondents, Dandy Products, Inc. and Joseph M. Gron, of the sales plan or method involving distribution of merchandise by means of chance, lottery or gift enterprise is contrary to the public interest and constitutes unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

5. The aforesaid acts and practices of the respondents, Dandy Products, Inc. and Joseph M. Gron, as herein found were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

6. The Federal Trade Commission has jurisdiction of and over respondents and the subject matter of this proceeding; and this proceeding is in the public interest.

## Order.

It Is Ordered that the respondents, Dandy Products, Inc., a corporation, and its officers, and respondent, Joseph M. Gron, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of transistor radios, watches, cameras, ball point pens, toy animals, dolls, electrical appliances, cutlery, or any other articles of merchandise, in commerce, as "commerce" is

defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to, or placing in the hands of others push cards or any other lottery device or devices, either with merchandise or separately, which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.
2. Shipping, mailing or transporting to agents or distributors, or to members of the purchasing public, push cards or any other lottery device or devices which are designed or intended to be used in the sale or distribution of respondents' merchandise, wares or goods to the public by means of a game of chance, gift enterprise or lottery scheme.
3. Selling or otherwise disposing of any merchandise, wares or goods by means of a game of chance, gift enterprise or lottery scheme.

It Is Further Ordered that the complaint herein be, and the same hereby is, dismissed as respects respondent, Carlo E. Ferrari.

William K. Jackson,
*Hearing Examiner.*

November 26, 1962.

## APPENDIX B.

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

Commissioners:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
A. Leon Higginbotham, Jr.

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| In the Matter of<br>Dandy Products, Inc., a corporation, and Joseph M. Gron, individually and as an officer of said corporation, and Joseph M. Gron and Carlo E. Ferrari, copartners trading and doing business as Capitol Mailers, | Docket No. 8467.<br>Decision of the Commission and Order to File Report of Compliance. |

This matter having been heard by the Commission upon the exceptions to the initial decision filed by respondents and counsel supporting the complaint and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission having determined that the hearing examiner's findings and conclusions are fully substantiated on the record and that the order contained in the initial decision is appropriate in all respects to dispose of this matter:

It Is Ordered that the exceptions of respondents and

counsel supporting the complaint to the initial decision be, and they hereby are, denied.

It Is Further Ordered that the hearing examiner's initial decision filed November 27, 1962 be, and it hereby is, adopted as the decision of the Commission.

It Is Further Ordered that respondents Dandy Products, Inc. a corporation and Joseph M. Gron, individually and as an officer of said corporation shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

By the Commission, Commissioner Anderson dissenting in part and Commissioner MacIntyre concurring.

(Seal)

Joseph W. Shea,
*Secretary.*

Issued: June 28, 1963.

Attached are: Statement by Commissioner Anderson dissenting in part, and concurring statement by Commissioner MacIntyre.

## APPENDIX C.

IN THE UNITED STATES COURT OF APPEALS,
For the Seventh Circuit.

No. 14320 September Term, 1963 April Session 1964

DANDY PRODUCTS, INC., a corporation, and JOSEPH M. GRON, individually and as an officer of said corporation, and JOSEPH M. GRON and CARLO E. FERRARI, copartners trading and doing business as CAPITOL MAILERS,
*Petitioners,*
v.
FEDERAL TRADE COMMISSION,
*Respondent.*

Petition to Review an Order of the Federal Trade Commission.

June 11, 1964

Before DUFFY, CASTLE and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* The question is whether the Federal Trade Commission's order that Dandy Products, Inc. and Joseph Gron, individually and as an officer of Dandy, cease and desist from using lottery devices or games of chance in sale or distribution of merchandise should be set aside because of a change in the "moral" climate of the business community. We think the order should stand.

Petitioners' briefs do not challenge, as they could not successfully do, the finding that the punchboard device used was a lottery device, or game of chance. *Federal*

*Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U. S. 304 (1934), *Gerson* v. *Federal Trade Commission*, 325 F. 2d 93 (7th Cir. 1963), *Wren Sales Co.* v. *Federal Trade Commission*, 296 F. 2d 456 (7th Cir. 1961), *Peerless Products, Inc.* v. *Federal Trade Commission*, 284 F. 2d 825 (7th Cir. 1960), *cert. denied*, 365 U. S. 844 (1961), *Goldberg* v. *Federal Trade Commission*, 283 F. 2d 299 (7th Cir. 1960), *Surf Sales Co.* v. *Federal Trade Commission*, 259 F. 2d 744 (7th Cir. 1958), *Modernistic Candies, Inc.* v. *Federal Trade Commission*, 145 F. 2d 454 (7th Cir. 1944).

But we are urged to turn away from *Keppel* because it was decided in "an earlier and different day" and involved children's market. However, *Modernistic Candies* involved both children and adults, and *Gerson* involved adults. The *Keppel* case was decided in 1934, and this court followed it in *Modernistic Candies* in 1944, has continued to follow it in more recent *Surf*, *Goldberg*, and *Peerless* cases, and in the 1961 *Wren Sales* case. Petitioners argue that "the moral tone of the business community in which [they] operate is substantially different" from that in *Keppel's* time, that criminal laws have developed which show a change in public policy with respect to gambling in general and punchboards in particular, and that the Commission erred in not taking evidence "of moral standards in the present business community with respect to this type of merchandising."

Without agreeing that morals are relative, as petitioners argue, we have considered petitioners' arguments that there are many contests, involving prizes, used by major companies; that in some states gambling is permitted and in others punchboards are held not to be gambling equipment; that gambling is not immoral per se, and is involved in stock brokerage and other businesses; and that a gambling "instinct" seems to be a weakness in human nature. All these arguments were addressed to the Com-

mission below, and in one degree or another have been addressed to this court, without success, in *Wren Sales*, *Peerless* and *Modernistic Candies*.[1] We are not persuaded that this merchandising practice is less an "unfair method of competition" today than it was in the time of *Keppel*.

The Commission was within the power granted to it, by Congress, in entering the order. See *Lichtenstein* v. *Federal Trade Commission*, 194 F. 2d 607 (9th Cir. 1952), *cert. denied*, 344 U. S. 819. And the law is firmly established that the merchandising practice found here is against the established public policy of the United States. *Peerless Products, Inc.* v. *Federal Trade Commission*, 284 F. 2d 825, 826 (7th Cir. 1960), *cert. denied*, 365 U. S. 844 (1961), *Surf Sales Co.* v. *Federal Trade Commission*, 259 F. 2d 744, 746 (7th Cir. 1958). As Chief Judge Hastings said in *Peerless*,

> "At the outset, we reaffirm that the 'law is now firmly established that the practice of selling goods by means which involve a game of chance, gift enterprise or lottery, including push cards such as we have here, is contrary to the established public policy of the United States and the sale and distribution, in interstate commerce, of such devices designed for the purpose of selling merchandise by games of chance or lottery is violative of the Federal Trade Commission Act.'"

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[1] The then Judge, later Supreme Court Justice, Minton disposed of a similar argument in *Modernistic Candies*:

> "Counsel for the petitioner discussed at great length from a sociological point of view, the age-old problem of the gambling instinct in the human being. According to his analysis, gambling pervades our entire economic system; thus insurance contracts are gambles, stock and grain exchange transactions are gambles, and the farmer's dependence on the weather is a gamble. Counsel's attempts to apply this analysis to the present case left us cold and unimpressed. He even reminded us that our great idol, Mr. Chief Justice Marshall in his day attended the horse races and wagered with his clergyman. In fact, they ran a book. As indicating how times have changed, and how even our coarse nature has yielded to the protecting

We see no merit in the claim that the order is erroneous because it failed to dismiss the partnership Capitol Mailers because the Commission found no evidence to warrant entering a cease and desist order against "• • • Gron and • • • Ferrari, copartners trading and doing business as Capitol Mailers • • •." The partners as individuals were respondents and the Commission dismissed as to Ferrari. This was proper and sufficient. The Commission prudently noted that the order against Gron individually will apply to his activities as a partner in Capitol Mailers.

In view of the fact that the Commission's finding as to the nature of the device is unchallenged, and sufficient to support the cease and desist order entered by the Commission, we need not pass on the question of limitation of cross-examination of witnesses with respect to the use of the merchandising device.

The petition to set aside the Commission's order is denied.

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care of governmental policy, we confess we do not even know a bookmaker, clerical or otherwise, and our passes to the beautiful race tracks around Chicago lie in our desk unused." 145 F. 2d at 454-55.

## APPENDIX D.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois.

Tuesday, July 7, 1964.

Before

Hon. F. Ryan Duffy, Circuit Judge,
Hon. Latham Castle, Circuit Judge,
Hon. Roger J. Kiley, Circuit Judge.

DANDY PRODUCTS, a corporation, et al., *Petitioners,*
No. 14320 *vs.*
FEDERAL TRADE COMMISSION, *Respondent.*

Petition for review of an order of the Federal Trade Commission.

It Is Ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

## APPENDIX E.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

DANDY PRODUCTS, INC., a corporation, and JOSEPH M. GRON, individually and as an officer of said corporation, and JOSEPH M. GRON, and CARLO E. FERRARI, co-partners trading and doing business as CAPITOL MAILERS,
*Petitioners.*
*vs.*
FEDERAL TRADE COMMISSION,
*Respondent.*
} No. 14,320

### FINAL DECREE AFFIRMING AND ENFORCING ORDER TO CEASE AND DESIST.

July 10, 1964.

The Federal Trade Commission, having issued an order to cease and desist on June 28, 1963, against Dandy Products, a corporation and Joseph M. Gron, individually and as an officer of said corporation in a proceeding before it entitled "In the Matter of Dandy Products, Inc., a corporation, and Joseph M. Gron, individually and as an officer of said corporation, and Joseph M. Gron and Carlo E. Ferrari, copartners trading and doing business as Capitol Mailers, Docket No. 8467" and a petition to review and set aside said order to cease and desist having been filed in this Court on September 17, 1963; and the transcript of the entire record in the proceedings which resulted in the

said order to cease and desist having been certified and filed in this Court; and the matter having been heard by this Court on briefs and oral argument on May 19, 1964; and this Court having rendered its decision on June 11, 1964;

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the aforesaid petition to set aside the order of the Federal Trade Commission in this cause be, and it hereby is denied; that the aforesaid order to cease and desist of the Federal Trade Commission herein be, and it hereby is, affirmed, and that Dandy Products, Inc., and Joseph M. Gron, hereby are commanded forthwith to obey said order and to comply therewith.

By the Court:

/s/ F. Ryan Duffy,
*United States Circuit Judge,*

/s/ Latham Castle,
*United States Circuit Judge,*

/s/ Roger J. Kiley,
*United States Circuit Judge.*

A True Copy:
Teste:

(Seal)

Kenneth J. Carrick,
*Clerk of the United States Court of Appeals for the Seventh Circuit.*

Dated: July 10, 1964.